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No. 742 and No. 813, Misc.

In the Supreme Court of the United States

OCTOBER TERM, 1959

TRI-CONTINENTAL FINANCIAL CORPORATION, PETITIONER

v.

HELEN GLENMORE, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI AND MOTION FOR LEAVE TO FILE PETITION FOR MANDAMUS OR OTHER APPROPRIATE WRIT TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE UNITED STATES AS AMICUS CURIAE

J. LEE RANKIN,
Solicitor General,
Department of Justice, Washington 25, D.C.

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This case is related to No. 741 and No. 812, Misc., in which the United States is filing simultaneously its brief in opposition. It involves the sixth count in a stockholders' derivative suit that challenged, as violating Section 20a of the Interstate Commerce Act, the same contract that was similarly challenged in the Government's suit that is involved in No. 741 and No. 812, Misc.

Under the contract, the New York, New Haven and Hartford Railroad ("New Haven") made a contingent commitment with a group of bankers, including petitioner, to repurchase 131,385 shares of its preferred stock from the banking group. The theory of both

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the Government's suit and the sixth count in the stockholder's suit is that the repurchase agreement constituted an issuance or modification of securities, for which Section 20a requires prior approval of the Interstate Commerce Commission; and that since such approval was not obtained, the agreement is unlawful.

The district court dismissed both the Government's complaint and the sixth count, holding that the contract was not covered by Section 20a. Both the United States and the stockholders appealed. The court of appeals decided the Government's appeal first, and held that Section 20a required prior Commission approval of the agreement. Subsequently, however, the court held that it had had no jurisdiction on the Government's appeal to decide that question, since it concluded that appeal in the Government's suit did not lie to it, but lay directly to this Court. At the same time, however, "for the reasons fully set forth" in its earlier opinion in the Government's appeal, the court of appeals reversed the judgment of the district court dismissing the sixth count of the stockholders' suit. The instant petition and motion for leave to file petition for mandamus or other appropriate writ seek review of the latter action.

The effect of the decision below in the instant case is to provide the same relief sought in the Government's suit, namely, a determination that the contract is illegal and the issuance of an injunction against its performance. Thus, the practical effect of the decision below in this case will be to render moot the Government's case.

The Government is filing this memorandum to comment briefly on petitioner's contention (Pet. 23), previously rejected by the court of appeals (Pet. App. C–6, C–21), that there has been "[i]nformal * * * clearance" of the transaction by the Commission. The argument rests on the statement (Pet. 22) that, ~~prior to~~ after entering into the agreement, the New Haven's counsel and its treasurer had a conference with a commissioner and a Commission official at which "[t]he making of the challenged agreement * * * was fully disclosed to these Commission officials and copies of the agreement were given to them," and they were "informed, moreover, that New Haven's counsel was of the opinion that the agreement was not within the purview of Section 20a and that accordingly New Haven did not propose to apply for Commission approval pursuant to that Section."

The fact of the matter is, however, as the court of appeals held (Pet. App. C–6) and as petitioner concedes (Pet. 7), that at no time did the New Haven seek Commission approval of the proposed transaction. Once it is established (as the court of appeals correctly held) that the transaction is covered by Section 20a and therefore requires prior Commission approval, nothing less than a formal application and formal Commission approval will suffice to validate the transaction. Section 20a specifically so provides. It states (Pet. App. D–1, emphasis added):

> It shall be unlawful for any carrier to issue any share of capital stock * * * unless and until, and then only to the extent that, *upon application by the carrier,* and after investi-

> gation by the Commission of the purposes and uses of the proposed issue and the proceeds thereof * * * the Commission *by order* authorizes such issue * * *.

Nothing in the statute sanctions the substitution of "informal consultation and clearance" for the formal filing, investigation and approval by order that the Act prescribes as the method by which Commission approval may be obtained for transactions covered by Section 20a. As this Court pointed out, in rejecting a similar claim that the alleged "knowledge or acquiescence of officers of the Federal Government" constituted a defense to a charge of illegal price-fixing under the Sherman Act, "Congress had specified the precise manner and method of securing immunity" and "[n]one other would suffice" (*United States* v. *Socony-Vacuum Oil Co.*, 310 U.S. 150, 225–227). Moreover, as the court of appeals indicated (Pet. App. C–17–18), the parties could have quickly obtained from the Commission a ruling whether the transaction was subject to Section 20a. They could either have had the New Haven "apply under §20a for approval of the agreement while at the same time moving to dismiss the application for want of jurisdiction" (a settled Commission practice for determining jurisdiction), or themselves have sought a declaratory order from the agency.

Had a formal application been filed for Commission approval under Section 20a, the agency would have been required by that section to investigate the "purposes and uses of the proposed issue and the proceeds thereof." And, before approving the trans-

action, the Commission would have had to find that the transaction was "compatible with the public interest," that it is "necessary or appropriate for or consistent with the proper performance by the carrier of service to the public * * * and * * * will not impair its ability to perform that service," and that it is "reasonably necessary and appropriate for such purpose" (Pet. App. D-2).

In determining these questions, the Commission could have considered the contention (Pet. 6–7) that "the transaction was in essence a banking-transaction whereby the Banking Group made its capital, to the extent of approximately $7,800,000, available to the New Haven" to enable the latter to eliminate a block of stock held by the Dumaine interests, which allegedly were preventing the New Haven from obtaining a bank loan necessary to repair flood damage to the carrier. The Dumaine group had been ousted from the management in a proxy contest in 1954 (R. 78a), and it had refused to vote its large minority holdings to authorize a bank loan unless dividends on the common stock would be withheld until the loan was repaid (Pet. 6–7). The Commission could have considered whether the stock-repurchase agreement was "compatible with the public interest" under the standards of Sections 20a, in view of the facts that the New Haven had not paid any dividends on its common stock since at least 1947 (Standard & Poor's, *Trade & Securities Ind.*, supplement dated May 7, 1959, page R. 60) and that the stock holdings of the then management of the New Haven "consist[ed] primarily of Common Stock" (R. 50a).

In other words, in order to make the findings required under Section 20a, the Commission frequently is required to conduct a full-scale inquiry involving numerous aspects of a carrier's transactions and financial position. It was precisely to insure that the Commission would have all the available information that Congress provided that Section 20a approval could not be given "unless and until * * * upon application by the carrier, and after investigation by the Commission * * * the Commission by order authorizes" the transaction. The facts of this case dramatically demonstrate that "[i]nformal consultation and clearance" is not an adequate substitute for the kind of inquiry that Congress intended the Commission to make under Section 20a.

With respect to petitioner's other contentions, the Government is of the view that the decision below on the merits is correct; and that, because of the unique procedural context in which it arises, the question whether the district court's dismissal of the sixth count in the stockholder's suit was reviewable under 28 U.S.C. 1292(a)(1) is not an appropriate one for further review in this case. For these reasons, we believe that the petition for a writ of certiorari in No. 742 and the motion for leave to file petition for mandamus or other relief in No. 813, Misc., should be denied.

Respectfully submitted.

J. LEE RANKIN,
Solicitor General.

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